NO. 80-6034

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

EUGENE WILLIAM GALL, JR. — PETITIONER

V.

COMMONWEALTH OF KENTUCKY — RESPONDENT

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVEN L. BESHEAR
ATTORNEY GENERAL

JAMES L. DICKINSON
ASSISTANT ATTORNEY GENERAL

K. GAIL LEECO
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601
(Telephone: 502-564-7600)

COUNSEL FOR RESPONDENT.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

WHETHER THE TRIAL COURT PROPERLY EXCUSED A VENIREMAN WHO WAS UNABLE TO ASSURE THE TRIAL COURT OF HIS ABILITY TO CONSIDER THE POSSIBLE IMPOSITION OF THE DEATH PENALTY FOR THE OFFENSE COMMITTED BY THE PETITIONER.

II.

WHETHER THE EXCLUSION OF THE VENIREMAN, IF ERRONEOUS UNDER WITHERSPOON V. ILLINOIS, IS RENDERED HARMLESS BEYOND A REASONABLE DOUBT UNDER CHAPMAN V. CALIFORNIA BY THE EXISTENCE OF A PEREMPTORY CHALLENGE WHICH WAS NOT EXERCISED AT TRIAL BY THE COMMONWEALTH.

III.

WHETHER BLOOD, HEAD HAIR, PUBIC HAIR AND SALIVA SAMPLES CAN BE SEIZED FROM A DEFENDANT WHEN SUCH SEIZURE IS PURSUANT TO A COURT ORDER BASED UPON AFFIDAVITS THAT SAMPLES WERE NEEDED TO COMPLETE THE INVESTIGATION OF RAPE AND MURDER.

IV.

WHETHER THERE EXISTS AN ADEQUATE INDEPENDENT STATE GROUND WHICH WOULD BAR A REVIEW BY THIS COURT OF THE PROPRIETY OF THE SEIZURE OF THE HEAD HAIR, PUBIC HAIR AND SALIVA SAMPLES.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii - v
OPINION BELOW.....	1
JURISDICTION.....	1 - 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2 - 3
COUNTERSTATEMENT OF THE CASE.....	3 - 9
REASONS FOR NOT GRANTING THE WRIT.....	9 - 26
I. DECISION OF THE COURT BELOW AS TO THE EXCLUSION OF DAVID CORRELL IS IN ACCORDANCE WITH THE OPINIONS OF THIS COURT.....	9 - 14
II. ANY CONFLICT BETWEEN THE OPINION OF THE COURT BELOW AND OTHER VARIOUS COURTS OF LAST RESORT IS NOT OF SUCH MAGNITUDE AS TO WARRANT THE ISSUANCE OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY.....	14 - 16
III. CONFLICT AMONG THE VARIOUS STATE AND FEDERAL COURTS AS TO WHETHER THE AVAILABILITY OF AN UNUSED PEREMPTORY CHALLENGE WOULD RENDER HARMLESS AN IMPROPER EXCUSAL OF A JUROR IS NOT OF SUCH A MAGNITUDE OR IMPORTANCE AS TO WARRANT A REVIEW OF THE OPINION BELOW.....	16 - 19
IV. NO SPECIAL NOR IMPORTANT REASONS EXIST WHICH WOULD WARRANT THE GRANTING OF THE WRIT ON THE ISSUE OF THE SEIZURE OF SAMPLES OF PETITIONER'S HAIR, SALIVA AND BLOOD.....	20 - 26
A. The Court Lacks Jurisdiction To Review The Seizure Of Petitioner's Hair And Saliva.....	20
B. The Court Below Correctly Decided That The Trial Court Order Permitting The Taking Of Samples Was Reasonable.....	20 - 22
C. The Decision Of The Kentucky Supreme Court Is Not In Conflict With Decisions Of This Court Or Other Courts..	22 - 24
D. The Import Of The Evidence Was Not Such As To Warrant Review.....	24 - 25
E. Stone v. Powell Does Not Require Review Of This Decision.....	25 - 26
CONCLUSION.....	26
CERTIFICATE OF SERVICE.....	27

TABLE OF AUTHORITIES

	Page
CASES:	
Adams v. Texas, ___ U.S. ___, 100 S.Ct. 2521 (1980).....	8
Alderman v. Austin, ___ F.Supp. ___ (S.D. 1980), appeal pending to 5th Cir.....	19
Alderman v. State, 246 S.E.2d 642 (Ga. 1978), cert.den. 439 U.S. 991 (1979).....	19
Barlow v. Wainwright, 323 F.Supp. 829 (N.D.Fla. 1971).....	18
Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979).....	18 - 19
Chambers v. State, 568 S.W.2d 313 (Tex. 1978), cert.den. 440 U.S. 928 (1979).....	19
Chapman v. California, 386 U.S. 18 (1967).....	16
Commonwealth for Use and Benefit of City of Paintsville v. Melvin, Ky., 256 S.W.2d 513 (1953).....	21
Daniels v. State, Okla Crim., 558 P.2d 405 (1977).....	15
Davis v. Georgia, 429 U.S. 123 (1976).....	16, 17, 18, 19
Foster v. State, Fla., 367 So.2d 930 (1979).....	15
Furman v. Georgia, 408 U.S. 238 (1972).....	15, 18
Gall v. Commonwealth, Ky., 607 S.W.2d 97 (1980).....	1
Henry v. State of Mississippi, 379 U.S. 443 (1965).....	2
Jackson v. State, Fla., 366 So.2d 755 (1978).....	15
Jones v. State, 256 S.E.2d 907 (Ga. 1979), cert.den. ___ U.S. ___, 99 S.Ct. 694 (1980).....	19

TABLE OF AUTHORITIES
(Continued)

	Page
Jurek v. Estelle, 593 F.2d 672 (5th Cir. 1979).....	18
Mathis v. New Jersey, 403 U.S. 946 (1971), rev'g. State v. Mathis, 52 N.J. 238, 245 A.2d 20 (1969).....	18
Mills v. State, 345 A.2d 127 (Md.Ct.Sp.Ap. 1975).....	24
Moore v. Illinois, 403 U.S. 953 (1971).....	18
People v. Goodridge, 76 Cal.Rpt. 421, 452 P.2d 637 (Calif. 1969).....	14 - 15
People v. Marshall, 244 N.W.2d 451 (Mich.Ct.App. 1976).....	24
Rawlings v. Commonwealth, Ky., 581 S.W.2d 348 (1979).....	26
Rawlings v. Kentucky, 448 U.S. ___, 106 S.Ct. 2566, 65 L.Ed.2d 633 (1980).....	26
Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).....	22 - 23
Speck v. Illinois, 403 U.S. 946 (1971), rev'g. People v. Speck, 41 Ill.2d 177, 242 N.E.2d 208 (1968).....	18
State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (N.C. 1975).....	14
State v. Ross, La., 343 So.2d 722 (1977).....	15
Stone v. Powell, 428 U.S. 469 (1976).....	25
United States v. Allen, 330 F.Supp. 1041 (E.D.Pa. 1972).....	23, 24
United States v. Sevier, 539 F.2d 599 (6th Cir. 1976).....	21 - 22
United States v. Ventrusca, 390 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1967).....	21

TABLE OF AUTHORITIES
(Continued)

	Page
Wigglesworth v. Ohio, 403 U.S. 947 (1971), rev'g. State v. Wigglesworth, 18 Ohio St.2d 171, 248 N.E.2d 607 (1969)	18
Williams v. State, Fla., 228 So.2d 377 (1969), rev. on other grounds, 408 U.S. 941	15
Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)	7-8, 9, 12-13, 15, 16, 17, 18, 19
FEDERAL CONSTITUTION:	
Amendment IV	2,22,25
Amendment VI	2, 13
Amendment XIV	2
FEDERAL STATUTE:	
28 U.S.C. 1257(3)	1
OTHER AUTHORITIES:	
Supreme Court Rule 17	1, 14 16, 25
Rule 9.40, Kentucky Rules of Criminal Procedure	2 - 3

OPINION BELOW

The opinion below from the Supreme Court of Kentucky is styled Eugene William Gall, Jr. v. Commonwealth of Kentucky and is published as modified at 607 S.W.2d 97 (Ky., 1980). On October 14, 1980, the Supreme Court of Kentucky denied the petitioner's request for a rehearing and issued its mandate, which ordered that the judgment of the Boone Circuit Court should be carried into execution on the fifth Friday following the date of issuance of the mandate.

On October 31, 1980, the Supreme Court of Kentucky entered an order staying the execution of the mandate. On December 9, 1980, Justice Potter Stewart entered an order which continued the stay of the mandate until such time as the Court could consider the petitioner's application for a writ of certiorari.

It should also be noted that the Supreme Court of Kentucky on December 9 entered into the record a corrected page which modified page 22 of the slip opinion.

The opinion of the Supreme Court of Kentucky, the modifications and the corrected page, as well as the order denying the petition for rehearing and the mandate are correctly set out in the petitioner's Appendix.

JURISDICTION

Petitioner's application to involve the jurisdiction of this Court has fulfilled the initial prerequisites of 28 U.S.C. 1257(3). The petition for a writ of certiorari, however, should be denied since the petitioner has failed to adequately demonstrate a conflict of such magnitude as to warrant a review of the opinion below. See Rule 17.

Furthermore, it should be noted that as to the propriety of the seizure of head hair, pubic hair and saliva samples, an objection was not entered to their seizure; the objection made by the trial counsel for the petitioner was directed solely towards the seizure of the blood sample.

In its review of this issue the Supreme Court of Kentucky expressly declined to review the merits of whether the hair and saliva samples were properly seized.

This Court has consistently held that the existence of an independent state ground precludes review of a related federal question. Henry v. State of Mississippi, 379 U.S. 443 (1965). In this case there is obviously an adequate and independent state ground which bars review of this particular issue.

The petition for a writ of certiorari should be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The petitioner has correctly stated that the constitutional provisions involved in this petition are the Due Process Clause of the Fourteenth Amendment, the Sixth Amendment, and the Fourth Amendment.

Respondent submits that full consideration of the petitioner's application is dependent upon Criminal Rule (RCr) 9.40, which provides:

> "(1) If the offense charged is a felony, the Commonwealth is entitled to five (5) peremptory challenges and the defendant or defendants jointly to eight (8) peremptory challenges. If the offense charged is a misdemeanor, the Commonwealth is entitled to three (3) peremptory challenges and the defendant or defendants jointly to three (3) peremptory challenges.

"(2) If one (1) or two (2) additional jurors are called, the number of peremptory challenges allowed each side shall be increased by one (1).

"(3) If more than one defendant is being tried, the court may at its discretion allow additional peremptory challenges to each defendant."

COUNTERSTATEMENT OF THE CASE

This action originated in the Boone Circuit Court, which sentenced the petitioner to death by electrocution. In a bifurcated proceeding a jury found the petitioner to be guilty of murdering Lisa Jansen, a twelve-year-old girl. Pursuant to law, a presentencing hearing was conducted. After hearing evidence in aggravation and mitigation, the jury returned written findings which found beyond a reasonable doubt that the offense was aggravated by the fact that Gall murdered Lisa Jansen during the commission of rape. The jury did not find any mitigating factors, statutory or otherwise, and recommended that Gall receive the death penalty.

Eugene William Gall, Jr., was indicted on April 27, 1978, and charged with murdering Lisa Jansen on or about April 5, 1978. On that day the Commonwealth presented to the court a variety of motions, including a motion supported by affidavits to obtain samples of Gall's head hair, pubic hair, saliva and blood. T.R. 5. The court granted this motion but qualified its order with the requirement that defense counsel be present during the sample procurement and that the blood samples be obtained by competent medical personnel. Defense counsel expressly stated that he did not have any objection to the procurement of the saliva and hair as samples for testing. T.E. 4.

At the petitioner's request the voir dire was individually conducted. A review of the entire record of the voir

dire indicates that the questioning was extremely lengthy. The record of the voir dire is nearly 1100 pages.

Of the fifty-two veniremen interviewed by the parties, seventeen were excused because they had formulated an opinion as to guilt or innocence. Most of the veniremen who were excused for this reason commented that they had children of about the same age as Lisa Jansen. See T.E. Vol. VI, 856. In other cases it was clear that formulation of an opinion was somewhat self-serving. See T.E. Vol. VI, 761-767.

The Commonwealth was entitled by statute to five peremptory challenges and received two additional challenges for the two alternates that were seated. During the course of the voir dire the Commonwealth's Attorney exercised six of the Commonwealth's strikes. The petitioner was entitled to eight peremptory challenges and received two additional challenges for a total of ten.

At the conclusion of the voir dire, the panel consisted of David Osborne, John Reid, Lloyd Vittitoe, Donna Wilmhoff, Ernestine Miller, Ralph Wayman, Mary Lou Epley, Gary Barton, Mary Perry, Barbara Perry, Michael Wolf, Douglas Palmer, and Bernice Utz.

During the voir dire three veniremen were excused for cause due to their inability to consider the death penalty as a possible punishment during the penalty phase of the trial. They were Virginia Freemon, Joyce Smith and David Correll.

In his petition for writ of certiorari the petitioner focuses his argument on the single contention of whether the trial court erred in excusing for cause venireman David Correll.

At the voir dire Mr. Correll was initially asked as to whether he had formulated an opinion as to guilt or innocence.

Correll thought he could set aside his opinion. T.E. Vol. VII, 963. Without inquiring further, Mathis turned to the questions concerning the imposition of the death penalty. During the course of questioning, it immediately became apparent that Correll was deeply concerned about the issue. The following exchange illustrates the attempt by the Commonwealth to clarify Mr. Correll's position:

> "MR. MATHIS: Do you believe that regardless of the case, no matter what the facts might be, that you because of your religious beliefs would not consider the death penalty as is required by law?
>
> "MR. CORRELL: I just don't know, sir.
>
> "MR. MATHIS: Well can you maybe think about it and give us some kind of an answer?
>
> MR. CORRELL: Well I guess it is just one of those things you would have to cross when you got to it, I guess, I don't know.
>
> "MR. MATHIS: Well what we are trying to decide, what we are trying to determine now, is how you feel about it so we will kind of know a little bit about what you might do in a given set of circumstances.
>
> "MR. CORRELL: I am, really I am undecided on it.
>
> "MR. MATTHIS: Well, let me ask you this, are you open to the imposition of the death penalty, should the facts warrant it?
>
> "MR. CORRELL: Maybe, yes.
>
> "MR. MATHIS: Is your mind in any way closed to the imposition of the death penalty?
>
> MR. CORRELL: No, I would say it isn't closed, but it - I am just undecided.
>
> "MR. MATHIS: As you sit there, think about a situation perhaps where there was a terrorist attack on women and children, would you feel like the death penalty might be appropriate in that case?
>
> "MR. CORRELL: It is very possible, yes, very possible.
>
> "MR. MATHIS: But you are just not sure?

"MR. CORRELL: I am not sure, no." T.E. Vol. VII, 966-967.[1]

Upon motion by the Commonwealth, the parties went in chambers. The Commonwealth presented the following motion:

> "Your Honor, we move to exclude this Juror for cause because he won't answer the questions one way or another. He says he is undecided whether he is for it, against it, whatever, and it is the Commonwealth's contention that that doesn't fall within the test, we just got a juror that won't answer the questions." T.E. Vol. VII, 970-97.

The court reserved its ruling and concluded its in-chambers discussion. Upon re-entering the courtroom, Judge Neace asked the following question and obtained the following response:

> "JUDGE NEACE: Let me repeat the question. Would your feelings that you have expressed absolutely preclude you from imposing a sentence of death under any possible circumstances?
>
> "MR. CORRELL: I am still undecided Judge. I just don't know about it. I just don't know." T.E. Vol. VII, 972.

Counsel, for the petitioner then attempted to clarify Correll's position. As a response, Correll said he could not think of a situation where he would impose the death penalty. Correll, however, said there might be a situation where "I might feel like it." T.E. Vol. VII, 974. Correll concluded by saying that he couldn't answer the question "yes or no." T.E. Vol. VII, 975.

The court granted the Commonwealth's motion to excuse Correll for cause. T.E. Vol. VII, 976. Gall was subsequently convicted of murder and the trial court pursuant to the jury recommendation imposed a sentence of death by electrocution.

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1 The petitioner has included in his Appendix the entire transcript of the voir dire of Mr. Correll.

On direct appeal, the Supreme Court of Kentucky first considered validity of the seizure of the samples and held:

> "Counsel for Gall objected only with respect to blood sample, stating that he had no objection as to the hair, saliva and fingerprints. Thus we consider only the matter of the blood sample.
>
> * * *
>
> "A divided court in Schmerber v. California, 384 U.S. 757 (1966), held it permissible for a police officer acting with probable cause under exigent circumstances to have a blood sample taken by a physician from an arrested drunk-driving suspect. The 5th Amendment protection against self-incrimination was held inapplicable because the majority of the court did not consider a surrender of blood as having testimonial import. 384 U.S. at p. 765. The 4th and 14th Amendment protection against unreasonable search and seizure did apply, but was held not to have been violated. In the absence, however, of exigent circumstances justifying immediate action without a warrant, the court indicated that the same precautions would be required as in the instance of a search warrant. That is, the justification must be determined by an informed, detached and deliberate judicial act. 384 U.S. at p. 770.
>
> "In this instance the trial court had before it an indictment charging Gall with the murder of Lisa Jansen and affidavits by the Commonwealth's Attorney and a detective of the Kentucky State Police stating that the physical samples were needed 'for purposes of completing their investigation into the rape and death of Lisa Jansen.' It seems to us that the relevance and importance of such evidence in a case involving rape are self-evident. We therefore hold that the order granting permission to obtain it from Gall's person was reasonable and was a valid basis for the subsequent admission of testimony derived from its analysis. Cf. Thompkins v. State, Ind., 383 N.E.2d 347, 351 (1979). Slip Opinion, pp. 4-5.

In considering the question of whether Mr. Correll was properly excused for cause, the Court first noted:

> "RCr 9.40 gives the Commonwealth six and the defense nine peremptory challenges in a felony case in which an alternate juror or jurors are impaneled. In this instance the trial court allowed each side one more. The Commonwealth used six of its seven strikes

and the defense exercised its entire 10." Slip Opinion, p. 8.

The court below then turned its attention to whether the removal for cause violated this Court's standard for exclusion of a venireman in a capital case as enunciated in Witherspoon v. Illinois, 391 U.S. 510 (1968), and Adams v. Texas, ___ U.S. ___, 100 S.Ct. 2521 (1980).[2] In holding that the trial court did not err in removing Mr. Correll for cause, the Supreme Court said:

> "It occurs to us that if a prospective juror will not say whether he can or cannot consider without prejudice the options from which he must choose in arriving at a verdict, he should be disqualified. The very least assurance to which the public is entitled is that he will exercise an honest discretion in resolving each issue submitted to him. Yet the effect of such equivocation is that on this important issue the juror will not give an assurance that he is able to exercise any discretion because he is not sure that his mind is open at the beginning. Surely it is elementary that a juror must be able to enter upon his duties with an open mind. It would seem beyond cavil that any court in the country would dismiss a prospective juror who could not say whether he would or would not be able to consider a verdict resulting in a prison sentence. The reason is that such a juror could not be an impartial juror, and it occurs to us that fundamental justice guarantees to the public impartial jurors in capital cases as well as in less serious proceedings." Slip Opinion, pp. 9-10.

The Court also considered the impact of this Court's recent decision in Adams v. Texas, supra, and stated:

> "So it may be seen that the jury's function with regard to the ultimate sentence is more limited here than it was under the Texas

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2 Adams was rendered after the parties had filed into the record their briefs on appeal. The Court, however, granted both counsel for the petitioner and the Commonwealth their requests to file supplemental briefing as to the applicability of Adams to the case at bar.

statute in Adams. Nevertheless, its determination that an aggravating circumstance existed is a sine qua non, and its recommendation of the death sentence, though not binding on the trial judge, obviously carries great weight. Hence we do not see any significant difference between out statutes ancd those of Texas insofar as the applicability of Adams may be concerned. There is, however, a dispositive distinction, we feel, between a prospective juror who admits he may be affected by the death penalty, or does not know whether he would or would not, and one who is unable to say even that he can consider that option. It is our opinion, therefore, that Adams does not apply to this case, and that Witherspoon does not require the acceptance of a juror who is unable to say that he can exercise an open-minded discretion with regard to the vital issues he will be called upon to decide. Cf. State v. Ross, La., 343 So.2d 722, 726-7 (1977)." Slip Opinion, p. 11.

Finally, the Court noted that the Commonwealth had left to it one peremptory challenge which was not exercised at trial. The Court as an alternative ground concluded:

". . . Surely, had the trial court denied its motion to strike Correll for cause, it would have used that challenge. Under similar circumstances the Supreme Court of Georgia held possible Witherspoon errors to have been harmless. Alderman v. State, Ga., 246 S.E.2d 642 (1978). See also State v. George, La., 346 So. 2d 694 (1977). We reach the same conclusion in this case." Slip Opinion, pp. 11-12.

After a full consideration of the petitioner's arguments, the Supreme Court reviewed the sentence of death and affirmed the conviction and the judgment of the Boone Circuit Court.

The petitioner now urges this Court to issue a writ of certiorari to the Supreme Court of Kentucky. Additional facts as needed will be presented below.

REASONS FOR NOT GRANTING THE WRIT

I.

DECISION OF THE COURT BELOW AS TO THE EXCLUSION OF DAVID CORRELL IS IN ACCORDANCE WITH THE OPINIONS OF THIS COURT.

Petitioner asserts in his application that his death sentence should be reversed because a juror was improperly excluded in violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and its progeny. As can be seen from the facts of this case, Mr. Correll was excused from the venire due to his inability to answer the questions posed to him by the Commonwealth and the trial court as to his ability to fairly consider all of the options available as punishment in the event Mr. Gall was found guilty of murder. In support of this contention a review of the voir dire and Mr. Correll's answers is in order.

The voir dire of Mr. Correll extended over fifteen pages of trial transcript. (T.E. 961-196.) Under questioning by the Commonwealth's Attorney, Mr. Correll just could not give an answer as to whether he could consider the imposition of the death penalty:

> "MR. MATHIS: Do you feel that the imposition of the death penalty is a fit and proper function of government?
>
> "MR. CORRELL: I am undecided, sir, really.
>
> "MR. MATHIS: Do you have or are you in agreement with the legislature that a law providing for the imposition of the death penalty in certain cases is necessary?
>
> "MR. CORRELL: I am not sure, sir.
>
> "MR. MATHIS: Do you believe that your religious scruples might prevent you from imposing the death penalty in any case?
>
> "MR. CORRELL: I don't know.
>
> "MR. MATHIS: Do you believe that regardless of the case, no matter what the facts might be, that you because of your religious beliefs would not consider the death penalty as is required by law?
>
> "MR. CORRELL: I just don't know, sir.
>
> "MR. MATHIS: Well can you maybe think about it and give us some kind of an answer?

"MR. CORRELL: Well I guess it is just one of those things you would have to cross when you got to it, I guess, I don't know.

"MR. MATHIS: Well what we are trying to decide, what we are trying to determine now, is how you feel about it so we will kind of know a little bit about what you might do in a given set of circumstances.

"MR. CORRELL: I am, really I am undecided on it." T.E. 965-967. (Emphasis added.)

Even when Mr. Mathis hypothesized the extreme case of a terrorist attack on women and children, Mr. Correll could not say that the death penalty would be appropriate. His answer was, "I am not sure." T.E. 967. In an attempt to gain an inkling as to whether Mr. Correll would consider the death penalty, the trial court questioned him:

"JUDGE NEACE: Mr. Correll, we realize and understand that different people have different feelings and that is everyone's right to express a different opinion to somebody else. You have indicated that because of religious feelings, I believe, you might have some hesitancy about imposing a death penalty, is that correct?

"MR. CORRELL: Yes sir, there is some question in my mind, yes.

"JUDGE NEACE: I understand, I am only trying to find out exactly how you do feel. Let me put it in this question, if I can. Would your feelings absolutely preclude you from imposing a sentence of death under any circumstances, any circumstances that you can think of?

"MR. CORRELL: I just don't know, sir, whether it would or not, really." T.E. 969-970. (Emphasis added.)

After Mr. Correll was given time to think about his answer, he still could not say what he would do under any circumstances:

"JUDGE NEACE: Let me repeat the question. Would your feelings that you have expressed absolutely preclude you from imposing a sentence of death under any possible circumstances?

"MR. CORRELL: I am still undecided Judge. I just don't know about it. I just don't know." T.E. 972. (Emphasis added.)

Even defense counsel could not elicit an answer from Mr. Correll:

> "MR. ZEVELY: So you are saying that there may very well possibly be a situation where you could, is that right?
>
> "MR. CORRELL: Well, I just don't know.
>
> "MR. ZEVELY: Okay.
>
> "MR. CORRELL: I will put it this way, there might be situations where I might feel like it.
>
> "MR. ZEVELY: Okay, in that situation, could you do it?
>
> "MR. CORRELL: Well that I don't know.
>
> "MR. ZEVELY: Well you never know until you are put to the test.
>
> "MR. CORRELL: That is right.
>
> "MR. ZEVELY: But the Court would like you to answer the question either yes or no and be honest about your answer.
>
> "MR. CORRELL: I can't really answer a yes or no and be honest at this point right now." T.E. 974-975. (Emphasis added.)

Mr. Correll just could not give any answer to the question of whether he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him. No one could tell from his answers whether he would or would not consider the death penalty. His exclusion for cause did not violate Witherspoon v. Illinois, supra.

In Witherspoon, this Court stated that the question presented to it for its consideration was a narrow one:

> ". . . It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. Nor does it involve the State's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to

> impose the death penalty or that they would refuse even to consider its imposition in the case before them. For the State of Illinois did not stop there, but authorized the prosecution to exclude as well all who said that they were opposed to capital punishment and all who indicated that they had conscientious scruples against inflicting it." Witherspoon, supra at 513-514.

In holding that the exclusion of a potential juror from a capital case due to his generalized objections to the imposition of the death penalty would violate the Sixth Amendment, this Court said in footnote 21:

> ". . . The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion." Witherspoon, supra at 522.

At the voir dire inquiry Mr. Correll was simply unable or unwilling to state whether he would consider the imposition of the death penalty. The state was not requesting an assurance that he "would" impose the death sentence but whether he "could" after hearing all the evidence inflict the penalty. When the entire colloquy is examined, it is clear that Mr. Correll was unable to articulate this assurance and thus he was properly excused. In other words, it is the respondent's contention that Witherspoon is not even applicable to this case. In Witherspoon this Court held that it would be error of a constitutional magnitude to excuse a juror because he voiced a conscientious scruple to the imposition of the death penalty. In this case Mr. Correll was unable to answer the questions of the Commonwealth and he was excused, not because

of any conscientious scruples but because he was unable to give any assurance as to his ability to impartially consider all of the available penalties.

The opinion of the Supreme Court of Kentucky does not conflict with the opinions rendered by this Court. David Correll was properly excused. The petition should be denied.

II.

ANY CONFLICT BETWEEN THE OPINION OF THE COURT BELOW AND OTHER VARIOUS COURTS OF LAST RESORT IS NOT OF SUCH MAGNITUDE AS TO WARRANT THE ISSUANCE OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY.

Rule 17.1(b) provides in part:

> ".1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals."

In an effort to justify his request in accordance with this provision, the petitioner alleges that the opinion of the Supreme Court of Kentucky conflicts with the opinions of various courts of last resort. The petitioner principally relies on People v. Goodridge, 76 Cal.Rpt. 421, 452 P.2d 637 (Calif. 1969), and State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (N.C. 1975). Both Goodridge and Monk have a factual predicate substantially different from the one at bar. In Goodridge, the juror initially stated that she could consider the penalty but later in a note indicated that she had some qualms about

imposing the penalty. In the case at hand, however, Mr. Correll could not even state whether he could or could not consider imposing the death penalty.

As pointed out by the petitioner, there are a number of decisions emanating from several states that on their facts support the position taken by the Supreme Court of Kentucky. In Florida, the Supreme Court found that Witherspoon was not violated where the excused venireman replied, "No sir, I wouldn't know. I just wouldn't know," to the question, "If the state proved its case to you beyond a reasonable doubt, could you vote for guilty even though it might mean the electric chair?" Williams v. State, Fla., 228 So.2d 377 (1969), rev. on other grounds, 408 U.S. 941. This case is still cited in Witherspoon-issue cases by the Florida Supreme Court, e.g., Jackson v. State, Fla., 366 So.2d 755 (1978), and Foster v. State, Fla., 367 So.2d 930 (1979).

The Supreme Court in Louisiana reached a similar conclusion in the post-Furman case of State v. Ross, La., 343 So.2d 722 (1977). There the juror "did not know what his position was." In finding his exclusion proper, the Court stated, "We are not convinced that it is improper to excuse a juror for cause where, as here, the juror is unwilling to assure the court that he can be neutral with respect to penalty." Id. at 727.

The Oklahoma Court has also recently upheld the excusing of veniremen who were unsure of their ability to assess the death penalty in Daniels v. State, Okla. Crim., 558 P.2d 405 (1977). As these cases demonstrate, the excusing of Mr. Correll, who could not give an answer as to whether he could consider the imposition of the death penalty, is not a violation of Witherspoon.

The issuance of a writ of certiorari is a discretionary act on the part of this Court. The petitioner has failed to demonstrate that the issue presented on his petition is of such major importance as to warrant this Court's review or relatively minor conflicts of interpretation among the various courts of last resort. The petition should be denied.

III.

CONFLICT AMONG THE VARIOUS STATE AND FEDERAL COURTS AS TO WHETHER THE AVAILABILITY OF AN UNUSED PEREMPTORY CHALLENGE WOULD RENDER HARMLESS AN IMPROPER EXCUSAL OF A JUROR IS NOT OF SUCH A MAGNITUDE OR IMPORTANCE AS TO WARRANT A REVIEW OF THE OPINION BELOW.

Rule 17.1.(c) states:

> "(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

In an effort to meet the requirement of this rule, the petitioner argues that the opinion of the Supreme Court of Kentucky which held that the Witherspoon error, if it was error, was harmless beyond a reasonable doubt, indirectly conflicts with the opinion of this Court as written in Davis v. Georgia, 429 U.S. 123 (1976). The petitioner also asserts that there is a direct conflict among the various state and federal courts as to this issue. Although there is admittedly a conflict of opinion, the conflict is not of such a magnitude as to warrant this Court's review of the issue. Furthermore, the opinion of the court below involves a correct application of the harmless error rule as set down by this Court in Chapman v. California, 386 U.S. 18 (1967).

The court below found that the Commonwealth's Attorney would have exercised his remaining peremptory challenge against Mr. Correll if Mr. Correll had not been excused for cause. Thus, if the court improperly excused the venireman, there was no prejudice resulting from the removal of the venireman. Nevertheless the petitioner asserts that decisions of this Court and of the Fifth Circuit Court of Appeals require a different result.

In answering this argument it is the respondent's contention that Davis v. Georgia, supra, does not compel a different holding. The decision by this Court in Davis v. Georgia did not discuss the possibility of remaining peremptory challenges. The dissenting opinion, however, mentioned that it was unclear whether there was a peremptory challenge remaining In Davis the State had used its 10 statutorily-allotted peremptory challenges. Thus, the impact of unused peremptory challenges in a Witherspoon issue was not before this Court. The issue presented in Davis was simply whether the erroneous exclusion of one juror would be tolerated under the Witherspoon rule.

The petitioner cites various decisions of this Court for the proposition that a case must be reversed when even one venireman is improperly excluded. Petitioner also asserts that this rule is applicable in a case regardless of the number of peremptory challenges left and refers to a number of cases denying certiorari where the court below had asserted as an alternative ground that the error was harmless. At least three of those cases do not clearly show that the number of peremptory strikes remaining had exceeded or equaled the number of jurors allegedly erroneously excused for cause. See Mathis

v. New Jersey, 403 U.S. 946 (1971), rev'g., State v. Mathis, 52 N.J. 238, 245 A.2d 20 (1969); Speck v. Illinois, 403 U.S. 946 (1971), rev'g., People v. Speck, 41 Ill.2d 177, 242 N.E.2d 208 (1968); Wigglesworth v. Ohio, 403 U.S. 947 (1971), rev'g., State v. Wigglesworth, 18 Ohio St.2d 171, 248 N.E.2d 607 (1969). In none of these cases was there any indication that the issue of unused peremptory strikes had been actually before this Court or had been given any consideration.

Furthermore, the impact of unused peremptory strikes on a Witherspoon issue attracted this Court's attention in Moore v. Illinois, 403 U.S. 953 (1971). Certiorari was granted in Moore to consider among other issues, the effect of unused peremptory strikes on erroneous Witherspoon challenges.[3] That question was not resolved in Moore due to the intervening decision of Furman v. Georgia, 408 U.S. 238 (1972). As will be noted below, this Court has consistently refused to consider this precise issue.

Petitioner also argues that the Fifth Circuit Court of Appeals has ruled that under this Court's decisions a Witherspoon violation could not be found to be harmless error. Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979). See also Jurek v. Estelle, 593 F.2d 672 (5th Cir. 1979); Barlow v. Wainwright, 323 F.Supp. 829 (N.D.Fla. 1971). Respondent submits that the interpretation accorded by the Fifth Circuit Court of Appeals to Davis v. Georgia, supra, restricts the application of the harmless error principle. In Burns, supra,

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3 Certiorari was granted on June 28, 1971, the same day of the summary reversals discussed in the previous paragraph. Thus, it seems clear that this Court did not consider those cases as precluding consideration of this issue.

the Fifth Circuit considered this Court's decisions regarding Witherspoon issues. The Court of Appeals construed Davis v. Georgia, supra, to hold that the exclusion of "one venireman on grounds at variance with the Witherspoon standard was fatal, and this although the State may have gone to trial with one peremptory challenge unexercised." Burns, supra at 1299. As noted previously by the respondent, this Court in its opinion in Davis did not discuss the possibility of peremptory challenges. The dissent merely noted that there may have been peremptory challenges unexercised. This issue was not involved in the decision in Davis and the respondent submits that the Fifth Circuit Court of Appeals' reliance on Davis for this point is unwarranted.[4]

As a final point, this Court has declined to grant a writ of certiorari in cases raising a contention identical to the one now being presented on this petition. See Alderman v. State, 246 S.E.2d 642 (Ga. 1978); cert.den. 439 U.S. 991 (1979); Jones v. State, 256 S.E.2d 907 (Ga. 1979), cert.den. ___ U.S. ___, 99 S.Ct. 694 (1980); and Chambers v. State, 568 S.W.2d 313 (Tex. 1978), cert.den. 440 U.S. 928 (1979).

The petitioner has not sufficiently demonstrated any compelling reason for a review of this issue. Accordingly, the petition should be denied.

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4 The petitioner also notes that the federal district court in Georgia rejected this contention in Alderman v. Austin, ___ F.Supp. ___ (S.D. 1980), appeal pending to the Fifth Circuit Court of Appeals. The Court in Alderman specifically relied on Burns v. Estelle, supra, in making its decision.

IV.

NO SPECIAL NOR IMPORTANT REASONS EXIST WHICH WOULD WARRANT THE GRANTING OF THE WRIT ON THE ISSUE OF THE SEIZURE OF SAMPLES OF PETITIONER'S HAIR, SALIVA AND BLOOD.

A.

The Court Lacks Jurisdiction To Review The Seizure Of Petitioner's Hair And Saliva.

As set forth in respondent's jurisdictional statement, this Court lacks jurisdiction to review the seizure of petitioner's hair and saliva, inasmuch as there was no objection at the trial level and the appellate court relied on state procedural grounds in refusing to review the alleged error.

B.

The Court Below Correctly Decided That The Trial Court Order Permitting The Taking Of Samples Was Reasonable.

The Commonwealth obtained samples of petitioner's hair, saliva and blood only after it had sought and received a court order allowing it to do so. The court order was based on a showing of probable cause through the affidavits of the Commonwealth's Attorney and a State Police Detective. The affidavits both gave the following grounds for obtaining the samples:

> "1. That the Commonwealth needs samples of the defendant's hair, saliva, photographs, finger and hand prints and blood for purposes of completing their investigation into the alleged rape and death of Lisa Jansen;
>
> "2. That the investigation and the ends of justice cannot be served without the above-mentioned items because of the nature of the alleged offenses of rape and murder;
>
> "3. That the purpose of obtaining these items is not to harass or to intimidate the defendant;" T.R. 19, 20.

As the Kentucky Supreme Court held, these affidavits, together with the indictment of petitioner for the rape-murder, furnished a reasonable basis for the taking of the samples, in particular the taking of the blood sample. The Kentucky Supreme Court decision is correct.

Kentucky and federal law hold that an affidavit for a search warrant is sufficient if it supplies reason to believe an offense has been committed and evidence material to the prosecution of the offense may be obtained under the search. Commonwealth for Use and Benefit of City of Paintsville v. Melvin, Ky., 256 S.W.2d 513 (1953); United States v. Ventrusca, 390 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1967). In the case at bar, the affidavits of the prosecutor and detective stated that the evidence was needed due to the nature of the crime. These sworn statements of need taken with the indictment charging petitioner with the rape-murder and the obvious relevance of evidence of the defendant's blood type in a rape prosecution provided the trial judge with probable cause to believe that an offense had been committed and that petitioner's blood/saliva sample would be relevant evidence. The order was based on sufficient evidence.

In reviewing a finding of probable cause to support a search warrant, the reviewing court must allow the magistrate the exercise of common sense judgment. As the Sixth Circuit has stated:

> "In judging probable cause Magistrates are not to be confined by niggardly limitations or by restrictions on the use of their own common sense. United States v. Ventrusca, 390 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1967).
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> * * *
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> "Great deference, even in doubtful cases must be given by courts to the determination

of magistrates, United States v. Ventrusca, 380 U.S. at 109, 85 S.Ct. 741.

* * *

> "The affidavit for a warrant must be interpreted in a common sense and realistic fashion. The elaborate specificity once required under common-law pleadings is not required. United States v. Ventrusca, supra, 380 U.S. at 108, 85 S.Ct. 741. The Magistrate has the same right as a Court to take judicial notice." United States v. Sevier, 539 F.2d 599 (6th Cir. 1976).

The trial judge in the case at bar can be considered to have used his common sense in reading the affidavits. The common sense encompassed knowledge of the affidavit and of the materiality of blood type as evidence in a rape prosecution. This common sense combined with the statements in the affidavits by the detective and the prosecutor that the evidence was needed for the investigation of the rape and death because of the "nature" of the offenses was sufficient to find probable cause. The Kentucky Supreme Court decision was correct.

C.

The Decision Of The Kentucky Supreme Court Is Not In Conflict With Decisions Of This Court Or Other Courts.

The Kentucky Supreme Court decision upholding the trial court order is not in conflict with decisions of this Court or other courts. Indeed, express support for the Kentucky decision can be found in this Court's decision in Schmerber v. California, 384 U.S. 757, 770, 86 S.Ct. 1826, 1835, 16 L.Ed.2d 908 (1966). In establishing the principle that the Fourth Amendment applies to the taking of blood, this Court stated,

> "Although the facts which established probable cause to arrest in this case also suggested the required relevance and likel success of a test of petitioner's blood for

> alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test." Schmerber, 384 U.S. at 770, 86 S.Ct. at 1835.

In the case at bar, the indictment and the facts in the affidavit suggested the required relevance and likely success of petitioner's blood and saliva as evidence. The detective did not draw the inferences himself. He went to the trial judge for an order. The trial judge issued the order. The taking of petitioner's blood and saliva was not an unreasonable search and seizure.

Nor does the Kentucky decision conflict with United States v. Allen, 330 F.Supp. 1041 (E.D. Pa. 1972), cited extensively by petitioner. There, in ruling the Allen affidavit insufficient, the court stated what it would consider to be necessary for a finding of probable cause for the taking of samples of hair, blood and X-rays. It stated:

> "It is sufficient if there is probable cause to believe that the hair, blood and X-rays the Government seeks would be evidence of a crime against the United States. The Government's motion as currently written fails to establish this probable cause.
>
> "While the existence of the indictments in this case might as a matter of law furnish probable cause to believe that on May 13, 1971 the Fidelity Bank of Folcroft was robbed by two men with handguns, and that defendants were those two men, it nowhere establishes that the requested blood, hair or X-rays are evidence of that crime." Id. at 1044.

The Allen standard can be applied to show probable cause in the case at bar. The existence of the indictment furnished probable cause to believe that a crime had been committed and the petitioner had committed it; the affidavits established that the requested blood and saliva would be evidence of that crime because of the nature of the crime

itself -- the nature of the crime being rape in the case at bar as opposed to robbery in Allen. Probable cause was shown. The Kentucky Supreme Court decision is correct.

Nor do the other two cases relied on by petitioner, Mills v. State, 345 A.2d 127 (Md.Ct.Sp.Ap. 1975), and People v. Marshall, 244 N.W.2d 451 (Mich.Ct.App. 1976), require review of the Kentucky decision. In Mills, the decision rested on failure of the prosecutor's motion to meet the state's warrant requirements, apparently because it lacked any supporting affidavits. In Marshall, the affidavits were found sufficient. The Kentucky decision is correct. The petition should be denied.

D.

The Import Of The Evidence Was Not Such As To Warrant Review.

Even if this Court should decide that the samples were not taken in compliance with Fourth Amendment protections, the petition should not be granted. The evidential import of the samples was not such as to warrant review. At trial, no evidentiary use was made of Gall's hair samples. As for the blood sample, an expert witness testified merely that the type of semen found in the car and on the victim's clothing was consistent with a person of Gall's blood type having had intercourse with the victim. T.E. 1764. He also testified that such semen type was not inconsistent with several other blood types having had intercourse with the victim. T.E. 1776. On appeal, petitioner argued to the Kentucky Supreme Court that such evidence was so inconclusive as to have violated his due process rights through its admittance. Clearly, such "inconclusive" evidence was not of such import at trial to warrant this Court's review of the issue.

Further, the "inconclusive" evidence may be contrasted with "conclusive" evidence that petitioner did commit the crime. Tire tracks at the scene matched the tires on his car; carpet fibers from the victim's clothing matched carpet fibers from his car; the bullets which killed the victim matched the bullets from his gun. Indeed, defense counsel relied on a defense of insanity rather than a defense of innocence. The import of the samples was not such as to warrant review. The petition should be denied.

E.

Stone v. Powell Does Not Require Review Of This Decision.

Petitioner argues that this Court should review the seizure of body samples because habeas corpus review is foreclosed under Stone v. Powell, 428 U.S. 469 (1976). Stone is a limitation on review of state court decisions through habeas corpus. It is not an expansion of review of state court decisions through petitions for certiorari. Stone does not expand this Court's jurisdiction to grant review on certiorari; this Court lacks jurisdiction to review the question of the seizure of saliva and hair samples because of the failure to object at trial level and the reliance on that state procedural ground by the appellant court. Stone does not expand the considerations for granting review on certiorari contained in Rule 17; petitioner has not demonstrated sufficient reasons under Rule 17 to review the question of the seizure of Gall's hair, saliva and blood samples. The petition should be denied.

Lastly, petitioner argues for review on the basis of an alleged "insensitivity" of the Kentucky Supreme Court to Fourth Amendment claims. That very argument is answered in Stone, 428 U.S. at 493, footnote 35.

Further, petitioner's claim of insensitivity is not supported by a single citation to a case wherein a recent Fourth Amendment decision by the Kentucky Supreme Court was overturned by this Court. Indeed, Rawlings v. Commonwealth, Ky., 581 S.W.2d 348 (1979), cited by petitioner, was affirmed by this Court. Rawlings v. Kentucky, 448 U.S. ___, 100 S.Ct. 2566, 65 L.Ed.2d 633 (1980). The Kentucky decision is correct. The petition should be denied.

CONCLUSION

For the reasons stated in the respondent's brief, the petitioner's application for writ of certiorari should be denied.

Respectfully submitted,

STEVEN L. BESHEAR
ATTORNEY GENERAL

James L. Dickinson

JAMES L. DICKINSON
ASSISTANT ATTORNEY GENERAL

K. Gail Leeco

K. GAIL LEECO
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601
(Telephone: 502-564-7600)

COUNSEL FOR RESPONDENT.